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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 557

A. C. PARK,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia, as yet unreported officially, is appended to the petition.

JURISDICTION

The petition invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (3). Respondent contends that such jurisdiction is non-existent in this particular case

for the reasons that (1) the judgment of the Supreme Court of Georgia is not a final judgment within the purview of the jurisdictional statute, and (2) the petitioner failed to raise a substantial federal question in the State courts.

QUESTIONS PRESENTED

1. Whether a statute of the State of Georgia (Ga. Code § 38-306 [1933]) which provides that after the fact of conspiracy is proven, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all, violates a defendant's federally-protected constitutional right to be confronted by the witnesses against him.

2. Whether a statute of the State of Georgia (Ga. Code § 38-302 [1933]) which permits the declarations of a co-conspirator offered as facts to explain conduct and motive to be admitted in evidence as original evidence deprives a defendant of due process of law.

STATUTES INVOLVED

Code of Georgia, § 38-302 (1933), which provided, as of the dates involved in this case, as follows:

> "When, in a legal investigation, information, conversations, letters and replies, and similar evidence are facts to explain conduct and ascertain motives, they shall be admitted in evidence, not as hearsay, but as original evidence."

Code of Georgia, § 38-306 (1933), which provided, as of the dates involved in this case, as follows:

> "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.

ARGUMENT

I

THE DECISION OF THE SUPREME COURT OF GEORGIA IS NOT A FINAL JUDGMENT WITHIN THIS COURT'S JURISDICTIONAL REQUIREMENT AS TO FINALITY.

The petitioner seeks to call under review a decision of the Supreme Court of Georgia in which a judgment favorable to the petitioner was entered. This judgment had the effect of vacating the petitioner's conviction and sentence and contained, as directions upon remand, an order granting the petitioner a new trial. The petitioner complains of the failure of the Supreme Court of Georgia to base this favorable disposition of his appeal upon all of the several alternative grounds urged. This Court has always held that based upon its statutorily-defined jurisdiction, only "final judgments" of State courts are subject to its review. *Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379, 381-2 (1953); *Gospel Army v. City of Los Angeles*, 331 U.S. 543 (1947). This limitation upon the Court's jurisdiction has been designed to exclude the exercise of the Court's jurisdiction in piecemeal proceedings calling for advisory opinions and premature adjudications of constitutional issues. *Pope v. Atlantic Coast Line R.R., supra.* "Were the reviewing power not limited to 'final judgments', litigants would be free to come here and seek a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation." *Ibid.*

Lack of finality of the instant judgment of the Supreme Court of Georgia may be demonstrated by refer-

ence to separate, alternative and overlapping chains of decision. Firstly, there are those decisions of this Court holding that the final judgment in a criminal proceeding is the sentence. *Parr v. United States,* 351 U.S. 513, 518 (1956); *Berman v. United States,* 302 U.S. 211, 212 (1937). Obviously, there is no sentence in the instant situation. Petitioner's conviction has been reversed and the proceedings against him have been remanded to the trial court for a new trial. Until such a new trial is held, and only if a conviction is therein secured, can the petitioner be sentenced for the offenses which have formed the basis of these proceedings. Secondly, there are those decisions of this Court which hold that where the effect of a State court's judgment is to grant a petitioner a new trial, the judgment will not be final. *Gospel Army v. City of Los Angeles, supra.* The rationale of this holding is based upon the rule that for a judgment of an appellate court to be final and reviewable, it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court, except the ministerial act of entering the judgment which the appellate court directed. *Gospel Army v. City of Los Angeles, supra; Department of Banking v. Pink,* 317 U.S. 264, 267-68 (1942). Clearly, the directions under which the Supreme Court of Georgia remanded the present case require more than merely ministerial action on the part of the trial court. A jury trial will be required. The disposition which a jury, not yet impaneled, will make of the matter cannot be predicted with any degree of certainty.

The fact that the decision of the Supreme Court of Georgia will be the law of the case is not relevant to the issue of finality. This Court is not bound by the law-

of-the-case rule on review of a case when, and if, it is appealed for the second time to the highest State court. See *Great Western Telegraph Co. v. Burnham*, 162 U.S. 339, 344-345 (1896).

II

THE PETITIONER FAILED TO RAISE A SUBSTANTIAL FEDERAL QUESTION IN THE SUPREME COURT OF GEORGIA.

As the petitioner candidly admits in his petition for a writ of certiorari, the federal question involved herein was first framed as such in the petitioner's motion for a rehearing. Throughout the briefs and argument, the petitioner's objections to certain allegedly hearsay declarations were argued upon strictly non-federal grounds. (Brief of the Appellant). For purposes of certiorari under 28 U.S.C. § 1257 (3), the validity of a State statute must have been "drawn in question" or a federal title, right, privilege or immunity must have been "specially set up or claimed." The statute contemplates the raising of a substantial federal question in the correct manner in order to give the State court to which the writ would be directed an opportunity to consider and pass upon the federal question. The substantial federal question, properly framed, must be raised at a proper point in the State-court proceeding. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962). A petitioner must follow the State procedures in raising the federal question; any other "course would be disrespectful of the State's procedures." *Ferguson v. Georgia*, 365 U.S. 570, 572, n.1 (1961). It is a recognized rule of Georgia procedure that constitutional questions should be raised as soon as the matter comes to the attention of the complaining party

or his attorney. *Stone v. The State,* 202 Ga. 203 (1947). See also *R.O.A. Moters, Inc. v. Taylor,* 220 Ga. 125-27 (1964). The validity of reasonable State procedural rules circumscribing the raising in issue of constitutional questions has been recognized. *Beck v. Washington, supra; Williams v. Georgia,* 349 U.S. 375, 382-83 (1955); *Edelman v. California,* 344 U.S. 357, 358-59 (1953). In the instant case, the constitutional issue was first raised after a judgment of reversal granting the petitioner a new trial. Rule 43 (c) of the Rules of the Supreme Court of Georgia, as set out in the appendix hereto, provides only for the granting of a rehearing upon the motion of "the losing party." In view of this provision, the fact that the petitioner here was the prevailing party in the Supreme Court of Georgia, and the appearance for the first time of an issue affecting the constitutionality of a statute of the State of Georgia, it cannot be stated that the denial of a rehearing effected an adjudication of constitutionality. Rather, the denial of a rehearing should be read as a discretionary avoidance of a constitutional issue rendered premature by the grant of a new trial.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 15, 1968